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Proposals to Regulate U.S. Outbound Investment to China

Introduction

The U.S. government has generally supported an open investment environment at home and abroad to promote U.S. economic growth, sustain the U.S. position as a premier destination for foreign direct investment (FDI), and ensure the competitiveness of U.S. companies. The U.S. government's interagency Committee on Foreign Investment in the United States (CFIUS) reviews a small subset of foreign inbound investments, primarily mergers and acquisitions, that could result in foreign control of a U.S. business and raise potential national security concerns. Since 2016, some Members of Congress have focused on the potential U.S. economic and national security effects of certain U.S. *outbound* investments to the People's Republic of China (PRC or China), including the transfer of U.S. technology and know-how in sensitive or strategic areas.

The 118th Congress is considering legislation to strengthen foreign investment review authorities and restrict some U.S. investment in the PRC and other "countries of concern" that involves dual-use and critical technology. In response to congressional activity, in August 2023, President Biden issued Executive Order (E.O.) 14105 to establish a targeted outbound investment program. Some countries (e.g., the PRC, South Korea, Taiwan) have regimes that govern some outbound investments. While the E.O.'s proposed scope of covered activity is limited, new U.S. outbound rules would depart from longstanding U.S. economic policy. Opponents argue that U.S. sanctions and export control tools are sufficient to address national security risks. Proponents argue that new measures are needed to preserve a market-based climate and counter PRC trade and investment rules that incentivize and require the transfer of U.S. technology and advanced capabilities to PRC competitors to the benefit of the PRC government. The 118th Congress is debating the scope of U.S. restrictions through hearings, oversight of the E.O. implementation, and proposed legislation.

Background and Policy Debate

Between 2016 and 2018, Congress led efforts to strengthen U.S. foreign investment review and considered regulating some outbound activities. Enactment of the Foreign Investment Risk Review Modernization Act (FIRRMA, Title XVII, Subtitle A, P.L. 115-232) in 2018 enhanced authorities for CFIUS to review, mitigate, or restrict *inbound* foreign investments in U.S. businesses involved in critical technologies, critical infrastructure, or sensitive personal data, and certain real estate transactions. Other proposed FIRRMA provisions—including on U.S. *outbound* investment in China—were diluted or eliminated during congressional and executive branch deliberations, following business pressures and other policy considerations. Members instead reformed U.S. export controls to regulate some critical and emerging dual-use technologies and technology transfer abroad. Since FIRRMA's enactment, Congress has returned to these

issues, in part in response to high-profile PRC greenfield investments in the United States and U.S. investments in China, particularly in strategic sectors (e.g., semiconductors and biotechnology). U.S. investments include the creation of research and development centers, production facilities, and joint ventures with the PRC government and PRC firms. Some Members say U.S. portfolio investments support strategic PRC firms and also should be regulated.

U.S. firms have benefitted from the ability to invest and sell in China as a top global market since the 1990s. Despite the commitments it made to join the World Trade Organization in 2001, the PRC maintains policies that require firms to localize production in China and transfer technology to PRC firms in order to sell or operate in the market. Since 2014, PRC practices have included the issuance of additional industrial policies and economic security measures. The U.S. Chamber of Commerce, among other business groups, has expressed support for the Biden Administration's efforts "to develop a thoughtful regime that safeguards American national security and economic leadership without unnecessarily restricting beneficial U.S. business activity." At the same time, the Chamber has advocated for an approach that is "narrowly tailored to target specific national security concerns in a transparent, efficient, and predictable manner," follows "clear, workable rules," and avoids creating a chilling effect on business activity.

Congressional Action

Congress has sought to address what some Members characterize as statutory, regulatory, and implementation gaps with regard to CFIUS and export controls. Some proposed legislation broadly aims to sustain and rebuild U.S. production, technology, and innovation capabilities and counter PRC trade and investment policies of concern. Proposals have included notification requirements, prohibitions in certain sectors, and a case-by-case review process broadly similar to CFIUS that some call a "reverse CFIUS" (**Text Box**).

Select Legislation on Outbound Investment

Enacted legislation in the 117th Congress includes

Consolidated Appropriations Act, 2023 (P.L. 117-328), enacted in December 2022, directed Depts. of Commerce and the Treasury to report on an outbound investment initiative and the resources required to establish and implement it. The agencies released their status reports in March 2023.

Proposed legislation in the 118th Congress includes

National Critical Capabilities Defense Act of 2023 (H.R. 3136) would create a new interagency committee to review and block or modify U.S. investments involving "national critical capabilities" in "countries of concern."

Outbound Investment Transparency Act of 2023 (S. 2678) proposed a notification scheme for certain sectors/ investments and was included in the Senate-version of the National Defense Authorization Act

(NDAA) for FY2024 (S. 2226). The Act was excluded from the enacted NDAA.

Preventing Adversaries from Developing Critical Capabilities

Act (H.R. 6349) would prohibit or require notification with respect to certain activities of U.S. persons involving covered sectors in countries of concern. It would codify key aspects of E.O. 14105.

Some Members advocate for an entity-based sanctions approach to restricting investments, rather than a sectoral approach. For example, H.R. 760 would direct the President to impose blocking sanctions on firms tied to PRC military and surveillance activities. In February 2024, committees held hearings to debate H.R. 6349 and H.R. 760. Some experts say a sectoral approach could be augmented by a sanctions approach by including portfolio investments and banning investment in PRC firms already subject to other U.S. government restrictions.

Executive Branch Action

E.O. 14105 directs the Department of the Treasury to create a new targeted outbound investment program. The E.O. reiterates a U.S. “open investment” posture that promotes “competitiveness, innovation, and productivity,” and support for cross-border investment, where “not inconsistent with the protection of United States national security interests.” It asserts that “advancement by countries of concern in sensitive technologies and products critical for the military, intelligence, surveillance, or cyber-enabled capabilities” constitutes an “unusual and extraordinary threat” to U.S. national security.

The E.O. authorizes a program with features that include:

- A two-tiered system that (1) prohibits certain U.S. outbound investments in “countries of concern” involving sensitive technologies and products that pose an acute national security risk, and (2) requires notification for investments involving technologies with a lower risk profile.
- “Covered national security technologies and products,” broadly identified as those in the (1) semiconductors and microelectronics, (2) quantum information technologies, and (3) artificial intelligence (AI) sectors. The E.O. indicates that not all activities or parts of these sectors, particularly in AI, would be covered.
- Unlike CFIUS, no case-by-case review of transactions.
- Requirements would apply only to investments involving the PRC (including Hong Kong and Macau).

On August 14, 2023, Treasury issued an advance notice of proposed rulemaking (ANPRM) on the E.O., requesting public input through September 2023. Treasury anticipates that covered transactions will include acquisitions of equity interests, greenfield investments, joint ventures, and certain debt financing transactions. Excepted transactions likely include those made by limited partners into venture capital (VC) or private equity (PE) funds that are determined to be solely passive and below a de minimis threshold. The E.O. cites the importance of regulating VC/PE as such deals can involve transfers of technology and capabilities. Treasury indicated in its ANPRM that it is disinclined to broadly control U.S.-PRC financial flows, noting the benefits.

Multilateral Cooperation

Some legislation (e.g., H.R. 6349) would direct the U.S. government to coordinate with allies and partners to develop comparable regimes. In May 2023, the G7 countries issued a joint statement recognizing “that appropriate measures designed to address risks from outbound investment could be important to complement existing tools of targeted controls on exports and inbound investments, which work together to protect our sensitive technologies from being used in ways that threaten international peace and security.” The U.S.-EU Trade and Technology Council reiterated the G7 language, and also emphasized a “common interest in preventing the narrow set of technological advances that are assessed to be core to enhancing the military and intelligence capabilities of actors who may use these capabilities to undermine international peace and security, from being fueled by our companies’ capital, expertise, and knowledge.” The European Commission is considering outbound investment measures as part of its economic security strategy.

Key Issues for Congress

Approaches to a U.S. outbound investment regime differ with regard to relevant countries, sectors, and activity to be covered. Most legislation targets China; some include Iran, North Korea, and Russia. H.R. 6349 most closely reflects the Biden Administration’s approach, and would expand the covered technologies and countries of concern. Some Members favor the legislative process to set “statutory boundaries” on any new rules. Some Members support more restrictions than the E.O. program, while others have raised concerns about the scope of new rules and whether they could discourage investment in the U.S. or erode U.S. competitiveness. As Congress considers whether and how to regulate outbound investment, key questions include:

- How should the U.S. government best organize to implement an outbound investment regime? What should the proper role and balance of national security and economic agencies be in operating such a regime? How might Congress consider potential areas of overlap between U.S. inbound and outbound review authorities?
- What visibility does the U.S. government have into U.S. investment activity in China without a notification or review process? What current authorities does the U.S. government have to review, mitigate, and restrict these activities? How effective have these tools been in addressing activities of concern?
- What is the best approach for delineating which sectors and activities should be subject to notification, restrictions, and exceptions? Are there specific sectors and activities particularly important to U.S. national security where there should be restrictions in place? Are there areas where discretion to review transactions on a case-by-case basis would be more appropriate?
- How would proposals affect U.S. competitiveness as a destination for investment, particularly compared to major economies that lack such regimes? What are the views of affected U.S. firms and other stakeholders?

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